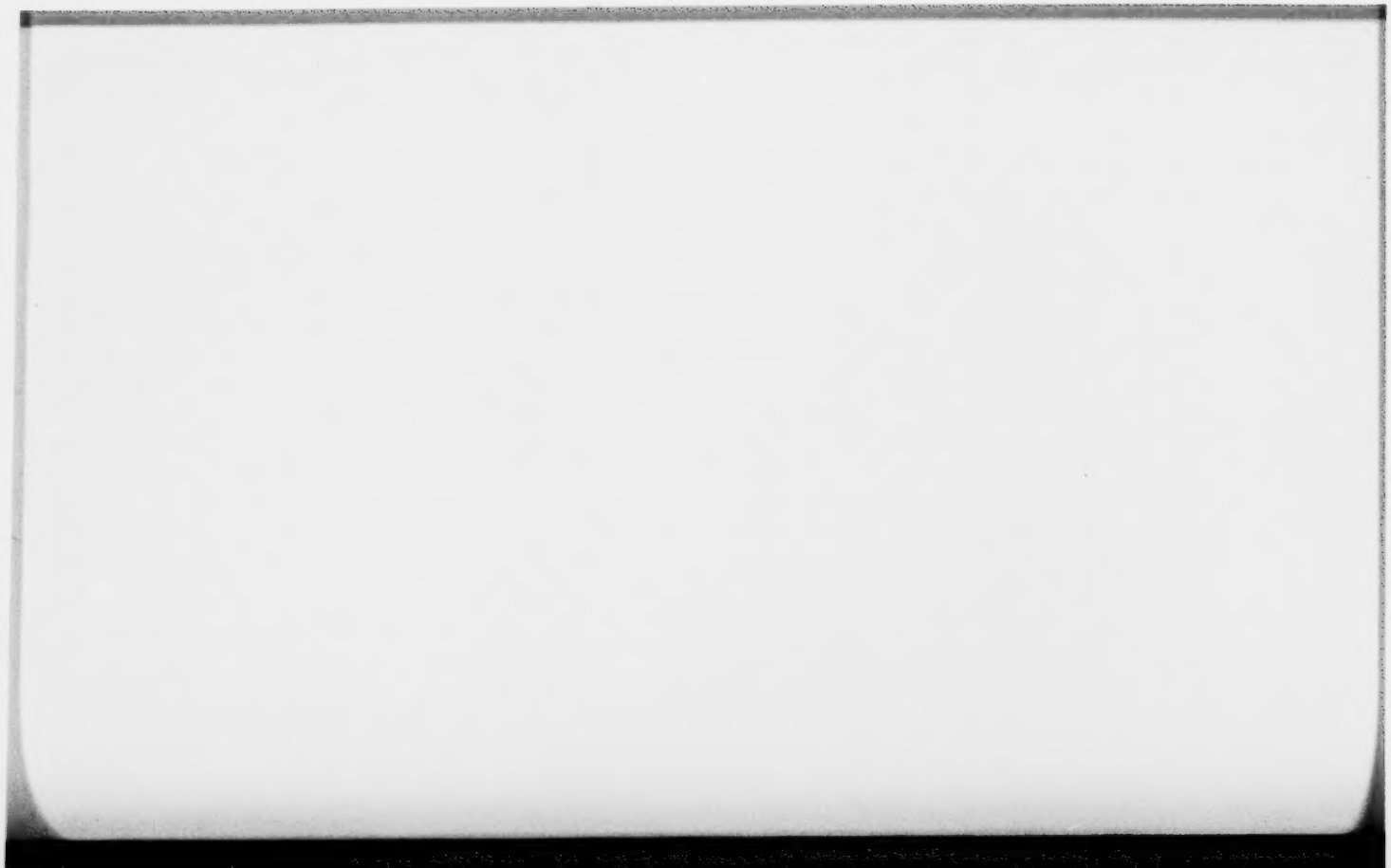

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 104

HAMLET ICE COMPANY, INCORPORATED, PETITIONER

v.

PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (R. 1–30) are not officially reported. The opinion of the Circuit Court of Appeals (R. 171–180) is reported in 127 F. (2d) 165.

JURISDICTION

The judgment of the Circuit Court of Appeals (R. 180–181) was entered on April 13, 1942. The petition for a writ of certiorari was filed on May

29, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTION PRESENTED

Whether petitioner's employees, engaged in the production of ice which is sold within the State to interstate rail carriers for use as a refrigerant of foods moving in interstate commerce, are engaged in "the production of goods for commerce" within the meaning of Sections 6 and 7 of the Fair Labor Standards Act.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act are set out in the Appendix.

STATEMENT

On August 29, 1940, the Administrator filed in the District Court a complaint against petitioner alleging that petitioner was violating Sections 15 (a) (1), 15 (a) (2), and 15 (a) (5) of the Fair Labor Standards Act and requesting an injunction against such violations. The complaint alleged that petitioner's employees were engaged in interstate commerce and in the production of goods for commerce within the meaning of Sections 6 and 7 of that Act but that petitioner had not complied with those provisions. In its answer, petitioner admitted noncompliance but asserted that the Act was not applicable to its employees. The District

Court found that petitioner was subject to the Act and issued the injunction prayed for (R. 1–35). The Circuit Court of Appeals affirmed (R. 171–181). The findings of the District Court, which are supported by the evidence and are not challenged by petitioner, may be summarized as follows:

Petitioner's employees are engaged within the State of North Carolina in the manufacture of ice, some 75 percent of which petitioner sells and delivers within the State to Fruit Growers Express Company, Seaboard Air Line Railway Company, and the Railway Express Agency, all interstate carriers by rail (R. 5–6, 13–16).[1] The ice is used by Fruit Growers to ice refrigerator cars carrying fruits and vegetables; most of the ice delivered to Seaboard is used to ice coaches, Pullman cars, dining cars, and railway post office cars on passenger trains and to ice foods and beverages in dining cars and drinking water in other cars, and by Railway Express to ice less-than-carload shipments of fish and shell food (R. 17, 19–20, 21). Practically all the cars thus iced with petitioner's product are on interstate journeys (R. 17, 20–21).

---

[1] During the period from October 24, 1938, to October 24, 1940, petitioner sold 41.5 percent of the ice produced to Fruit Growers Express, 25.38 percent to Seaboard Air Line Railway, and 8.4 percent to the Railway Express Agency (R. 13–14). The remainder, about 25 percent of petitioner's output, is sold from its substation in Hamlet to purchasers who consume it within the State (R. 3). The employees at the substation are not covered by the injunction (R. 28, 32).

The actual icing of the cars is performed by employees of the carriers, who break up 300-pound blocks received from petitioner into sizes suitable for placing in the bunkers of the refrigerator cars and in the coolers and ice boxes of the passenger and other cars (R. 17–21). At the time the ice is manufactured, petitioner knows and intends that the ice will be sent out of the State by the purchasers (R. 21–22; see R. 145–146, 148–149, 151–156, 157–163, 164–168).

ARGUMENT

Petitioner contends (pet. 9–10) that it is not engaged in interstate commerce, that its goods are not produced for commerce, and that it is excluded from the Act by the definition of "goods" in Section 3 (i). Since the ice petitioner produces is shipped and used on interstate trains, petitioner plainly is engaged in the "production of goods for commerce," and it is immaterial whether petitioner itself is engaged in interstate commerce. *Kirschbaum* v. *Walling,* No. 910, last Term; *Enterprise Box Co.* v. *Walling,* 125 F. (2d) 897 (C. C. A. 5), certiorari denied, June 8, 1942, No. 1275, last Term.

Section 3 (i) excludes from the term "goods" products "*after* their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer or processor thereof." [Italics supplied.] Since petitioner produces goods *before* their delivery to the ultimate consumer, it does not come within this provision.

As the language of the clause indicates and as the court below held (R. 179–180), the purpose of the provision was not to make the Act inapplicable to producers, but to protect the ultimate consumer who carries goods across state lines as his personal property from the prohibitions of Section 15 (a) (1). Manifestly, even if the carriers be regarded as ultimate consumers, the fact that the ice might not be goods while in their possession does not relate back to destroy its character as "goods" at the time of production. The identical contention was rejected in the *Enterprise Box* case, *supra,* in which this Court denied certiorari. In accord also are *Gordon* v. *Paducah Ice Manufacturing Co.,* 41 F. Supp. 980, 986 (W. D. Ky.); *Fleming* v. *Atlantic Co.,* 40 F. Supp. 654, 662 (N. D. Ga.), pending on appeal to the Fifth Circuit; see *Fleming* v. *Hitchcock,* 38 F. Supp. 358 (S. D. Fla.). *Contra: Chapman* v. *Home Ice Co.,* 43 F. Supp. 424, 430 (W. D. Tenn.), pending on appeal to the Sixth Circuit. With the exception of the *Chapman* case, which is contrary to the weight of authority, none of the cases cited by petitioner has any bearing upon the question presented.

CONCLUSION

There is no conflict of decisions among the Circuit Courts of Appeals, and the decision below is plainly

correct. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1942.

APPENDIX

Fair Labor Standards Act (Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 201):

SEC. 3. (b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

* * * * *

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

* * * * *

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

* * * * *

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce.

* * * * *

SEC. 15. (a) After the expiration of one hundred and twenty days from the enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation.

U. S. GOVERNMENT PRINTING OFFICE: 1942